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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

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*Ex parte* ROBERT F. RIOUX, ROBERT GARABEDIAN and  
CHRISTOPHER PEARSON

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Appeal 2007-2813  
Application 10/685,744  
Technology Center 3700

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Decided: February 19, 2008

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Before DEMETRA J. MILLS, ERIC GRIMES, and RICHARD M.  
LEBOVITZ, *Administrative Patent Judges*.

GRIMES, *Administrative Patent Judge*.

**DECISION ON REQUEST FOR REHEARING**

Appellants have requested rehearing of the decision entered Sept. 26, 2007 (“Decision”), which affirmed rejections of claims 1-16 (all of the pending claims) for obviousness. The request for rehearing is denied.

**DISCUSSION**

Appellants argue that “the Board erred by defining the problem with which the inventors were concerned much too broadly; that is, by defining the problem as ‘how to also deliver fluid, specifically electrolytic fluid, to the tissue.’ (Page 7, lines 7-9 of Decision).” (Req. Reh’g 3.) Appellants

also argue that the “Board erred in concluding that VanTassel suggests incorporating a sintered porous structure into the Edwards probe. . . . No such teaching, suggestion, or motivation is found in Edwards or VanTassel.” (Req. Reh’g 6.)

These arguments do not “state with particularity the points believed to have been misapprehended or overlooked by the Board,” as required by 37 C.F.R. § 41.52. The essence of Appellants’ arguments is that they disagree with the conclusions that we reached in the Decision. That is not a proper basis for a Request for Rehearing. For an applicant dissatisfied with the outcome of a Board decision, the proper course of action is to appeal, not to file a Request for Rehearing to re-argue issues that have already been decided. *See* 35 U.S.C. §§ 141, 145. Since Appellants have not pointed out any points that we overlooked or misunderstood, we decline to revisit our earlier conclusions.

Finally, Appellants argue that “when using the ‘functional approach’ set forth in *KSR*, the claims are not obvious over the combination of Edwards and VanTassel” (Req. Reh’g 10). Appellants point out that *KSR* was decided after the briefing in this appeal was completed (*id.* at 3), and argue that,

to the extent that the incorporation of the sintered porous structure disclosed in VanTassel can be considered a substitution of the fluid distribution pores in the shaft of the Edwards probe, such substitution would not yield a predictable result. In particular, based on VanTassel’s disclosure that a sintered porous structure can be used to microinject a medicament into tissue while preventing the rapid transfer of the medicament (see col. 2, lines 24-32), the incorporation of the sintered porous structure disclosed in VanTassel into the Edwards probe would yield unpredictable results—i.e., the

uniform delivery of electrolytic fluid into tissue to produce a larger and more efficient tissue ablation, which is not discussed in VanTassel or any other prior art reference cited by the Examiner.

(*Id.* at 9-10.)

New arguments based on recent court decisions may be acceptable in a Request for Rehearing, 37 C.F.R. § 41.52(a)(2), but this argument is unpersuasive. An assertion of unpredictable results is akin to an assertion of unexpected results and must be supported by evidence. *See In re Geisler*, 116 F.3d 1465, 1470 (Fed. Cir. 1997) (“[I]t is well settled that unexpected results must be established by factual evidence. ‘Mere argument or conclusory statements in the specification does not suffice.’”).

Appellants have pointed to no persuasive evidence showing that the incorporation of VanTassel’s sintered porous needle into Edwards’ apparatus would result in “larger and more efficient tissue ablation” as asserted in the Request for Rehearing. The instant Specification states that “the sintered/porous material may substantially increase the echogenicity of the needle when using ultrasound imaging” (Spec. 28: 10-11) and that “[b]ecause of the porous nature of the sintered material, the saline may more uniformly permeate the surrounding tissue as compared with a needle including a lumen having only one or more discrete outlets” (*id.* at 28: 22 to 29: 2). Neither of these statements, however, shows that using a sintered porous material causes “larger and more efficient tissue ablation,” or that using a sintered porous material provides any unpredictable result.

REHEARING DENIED

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